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Al Bakhtiar bin Ab Samat v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–154 OF 2010
LOW HOP BING, ABDUL WAHAB PATAIL AND BALIA YUSOF JJCA
5 MARCH 2012

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Impugned drugs recovered from room — Whether appellant had exclusive control of room — Whether appellant brought police party to room — Whether appellant's defence bare denial — Whether an afterthought — Whether failure to appreciate defence case a misdirection — Whether conviction justified

D

Evidence — Adverse inference — Failure to call witness — Whether adverse inference could be invoked — Whether adverse inference against appellant unnecessary and uncalled for — Evidence Act 1950 s 114(g)

E

Evidence — Similar fact evidence — Admission of — First charge was for possession of 30.40g of cannabis and second charge for trafficking dangerous drugs — Whether any similarity in respect of both charges — Whether trial judge misdirected himself when acted on evidence of first charge to prove knowledge of trafficking charge — Principles relating to similar fact evidence — Evidence Act 1950 ss 14 & 15

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The appellant was convicted for trafficking in 993.8g of cannabis and was sentenced to death. At the same trial, the appellant was also charged for possession of 30.40g of cannabis under s 6 of the Dangerous Drugs Act 1952 and punishable under s 39A(1) of the same Act. For the said offence, he was found guilty and sentenced to three years imprisonment and three strokes of rotan. The challenge put forth by the appellant was in respect of how the impugned drugs were recovered from the room. The appellant's defence was that he was not in exclusive control of the room where the drugs were found and the drugs could have been placed there or belonged to others who had access to the room. It was also part of his defence that he did not bring the police party to his room, instead he was taken there. The appellant's version was that the police party ransacked his room and found the drugs themselves. The appellant further complained of the trial judge's comment on the failure of the defence to call a certain witness and in invoking s 114(g) of the Evidence Act 1950 ('Act') against him. The two main grounds of appeal raised by appellant were as follows: (a) that the learned trial judge misdirected himself when he failed to appreciate the defence case; and (b) that the learned trial judge

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misdirected himself when he acted on the evidence of the first charge as similar fact evidence to prove knowledge in respect of the trafficking charge.

Held, allowing the appeal, setting aside the conviction and sentence on the trafficking charge:

(1) The appellant's cross-examination of SP5, SP7 and SP8 and putting to these witnesses his version was part of the process of his defence. What the appellant did was merely exercising his legitimate right and duty of advancing his defence during the prosecution's case itself. He crystallised the said defence as evidence during the defence stage when he together with SD2, SD3, SD4 and SD5 gave evidence. The defence put forth by the appellant was not a bare denial and certainly far from being an afterthought (see para 13).

(2) The appellant's defence was that he did not know about the drugs found in the room. The room was accessible to at least two or three other persons. The drugs could have been placed there by these other persons or could have belonged to his uncle, Kamil, a confirmed drug addict. The accessibility of the room to these other persons was brought up when SP3 and SP8 were cross-examined. Clearly, the defence was not an afterthought. Even, if they were 'afterthoughts', they do not in any way help bolster the defence case and neither do they strengthen the prosecution's case (see paras 15–16).

(3) Further, the trial judge had failed to consider the evidence of SD2, SD3, SD4 and SD5 which would have supported the appellant's version and defence that he was not in exclusive control of the room where the drugs were found and the drugs could have been placed there or belonged to others who had access to the room. Failure of the trial judge to address his mind to these evidences was a misdirection. This merits the intervention of this court and the learned trial judge's decision was liable to judicial correction (see para 23).

(4) The drawing of an adverse inference by the learned trial judge under s 114(g) of the Act on the failure of the defence to call L/Kpl Azhar was really unnecessary and uncalled for (see para 24).

(5) Before acting on the similar fact evidence the trial judge must undertake a weighing exercise and ask whether the prejudicial effect of that similar fact evidence would be outweighed by its probative value. In this case, before admitting the similar fact evidence, nowhere in the judgment of the learned trial judge is there the kind of balancing exercise as dictated by ss 14 and 15 of the Act. This again was a misdirection (see para 31).

[Bahasa Malaysia summary

Perayu disabitkan terhadap pengedaran 993.8g kanabis dan dihukum mati. Dalam perbicaraan yang sama, perayu juga dituduh memiliki 30.40g kanabis

di bawah s 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39A(1) Akta yang sama. Bagi kesalahan tersebut, dia didapati bersalah dan dihukum tiga tahun penjara dan tiga kali sebatan dengan rotan. Cabaran yang dikemukakan oleh perayu adalah berkaitan dengan bagaimana dadah yang dipertikaikan ditemui daripada bilik tersebut. Pembelaan perayu adalah bahawa dia tidak mempunyai kawalan eksklusif bilik di mana dadah tersebut dijumpai dan dadah tersebut mungkin telah diletakkan di sana atau dimiliki oleh orang lain yang mempunyai akses ke bilik tersebut. Adalah juga sebahagian pembelaannya bahawa dia tidak membawa pasukan polis ke biliknya, sebaliknya dia yang dibawa ke sana. Versi perayu adalah bahawa pasukan polis menggeledah biliknya dan menjumpai sendiri dadah tersebut. Perayu selanjutnya mengadu bahawa komen hakim perbicaraan mengenai kegagalan pihak pembelaan untuk memanggil beberapa saksi dan dalam membangkitkan s 114(g) Akta Keterangan 1950 ('Akta') terhadapnya. Dua alasan utama rayuan yang dibangkitkan oleh perayu adalah seperti berikut: (a) bahawa hakim perbicaraan tersalah arah dirinya apabila dia gagal mempertimbangkan kes pembelaan; dan (b) bahawa hakim perbicaraan tersalah arah dirinya apabila dia bertindak atas keterangan pertuduhan pertama sebagai keterangan fakta serupa untuk membuktikan pengetahuan berkaitan dengan pertuduhan pengedaran.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman atas pertuduhan pengedaran:

(1) Pemeriksaan balas perayu bagi SP5, SP7 dan SP8 dan mengemukakan kepada saksi-saksi ini versinya adalah sebahagian daripada proses pembelaan. Apa yang perayu lakukan adalah semata-mata melaksanakan hak dan kewajipan sahnya mengemukakan pembelaannya semasa kes pendakwaan. Dia membentuk pembelaan tersebut sebagai keterangan di peringkat pembelaan apabila dia bersama dengan SD2, SD3, SD4 dan SD5 memberikan keterangan. Pembelaan yang dikemukakan oleh perayu bukan penafian semata-mata dan sememangnya jauh daripada fikiran semula (lihat perenggan 13).

(2) Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan mengenai dadah yang dijumpai di bilik tersebut. Bilik tersebut boleh diakses oleh sekurang-kurangnya dua atau tiga orang. Dadah tersebut mungkin diletakkan di situ oleh orang lain ini atau mungkin kepunyaan pakciknya, Kamil, seorang yang disahkan penagih dadah. Akses ke bilik ini kepada orang lain dibangkitkan semasa pemeriksaan balas SP3 dan SP8. Jelas, pembelaannya bukan fikiran semula. Walaupun ia adalah '*afterthoughts*' ia tidak dalam apa cara sekalipun membantu kes pembelaan dan ia juga tidak mengukuhkan kes pihak pendakwaan (lihat perenggan 15-16).

(3) Selanjutnya, hakim perbicaraan telah gagal mempertimbangkan

keterangan SD2, SD3, SD4 dan SD5 yang mungkin telah menyokong versi perayu dan pembelaan bahawa dia tidak mempunyai kawalan eksklusif bilik tersebut di mana dadah tersebut dijumpai dan dadah tersebut mungkin telah diletakkan di sana atau kepunyaan orang lain yang mempunyai akses ke bilik tersebut. Kegagalan hakim perbicaraan untuk menumpukan perhatian kepada keterangan ini adalah salah arah. Ini mewajarkan campur tangan mahkamah ini dan keputusan hakim perbicaraan yang bijaksana adalah perlu diperbetulkan secara kehakiman (lihat perenggan 23).

(4) Inferens bertentangan yang dibuat oleh hakim perbicaraan yang bijaksana di bawah s 114(g) Akta tersebut atas kegagalan pembelaan memanggil L/Kpl Azhar adalah amat tidak perlu dan tidak wajar (lihat perenggan 24).

(5) Sebelum bertindak atas fakta keterangan serupa, hakim perbicaraan perlu membuat pertimbangan sama ada kesan perjudis fakta keterangan serupa tersebut akan diatasi oleh nilai probatifnya. Di dalam kes ini, sebelum menerima fakta keterangan serupa, tidak ada di mana-mana dalam penghakiman hakim perbicaraan yang bijaksana pelaksanaan pertimbangan seperti yang dinyatakan oleh ss 14 dan 15 Akta. Ini, sekali lagi, adalah salah arah (lihat perenggan 31).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334; [2004] 6 AMR 810, CA (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62; [1997] 3 CLJ 17, CA (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Makin v AG for New South Wales [1894] AC 57, PC (refd)
PP v Mohamad Roslan bin Desa & Anor [2011] 4 MLJ 826, CA (refd)
R v Scarrott [1978] QB 1016, CA (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A(1)
Evidence Act 1950 ss 14, 15, 114(g)
Penal Code ss 302, 304(b)

Appeal from: Criminal Trial No N–05–154 of 2010 (High Court, Seremban)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

[1] The appellant was convicted by the Seremban High Court for trafficking in 993.8g of cannabis and was sentenced to death. At the same trial, the appellant was also charged for possession of 30.4g of cannabis under s 6 of the Dangerous Drugs Act 1952 and punishable under s 39A(1) of the same. For the said offence, he was found guilty and sentenced to three years imprisonment and three strokes of the rotan.

THE PROSECUTION'S CASE

[2] On 8 July 2006 at about 8.30pm, Chief Inspector Hafiz ('SP7') together with SP5, SP1 and his men went to Kg Jati on a crime prevention round against drug trafficking. They took up ambush position at the road side and about ten minutes later SP7 and SP5 saw a male person approaching on a motorcycle. The said male person was later identified as the appellant. The appellant was stopped by SP5 who then carried out a body search and found from the appellant's right jeans pocket a small black pouch. On further examination, SP5 found five plastic packets containing dried plant materials suspected to be cannabis. This formed the subject of the charge under s 6 of the Dangerous Drugs Act 1952 against the appellant.

[3] The appellant was taken to the Kuala Pilah Police Station and was later interrogated by SP7. Resulting from the interrogation, the appellant then led SP7 and his men to a house No 19A Kg Parit Seberang ('said house') with his hand cuffed to the back. Inside the house were the appellant's adopted sister ('SP3') and his mother (now deceased) and his grandmother. The appellant then showed a room to the police party. It was closed. SP7, SP5 and the appellant who was guarded by L/Kpl Azhar entered the room. Upon entering the said room, both SP7 and SP5 could sense a strong smell of ganja. The appellant indicated he wanted to show something and SP7 instructed L/Kpl Azhar to change the appellant's handcuff from back to the front. The appellant then pointed to a cupboard and from among the clothes took out a block of dried plant material wrapped in a transparent plastic and handed it over to SP7. The appellant then took out a red plastic container from underneath a table and also handed it over to SP7. Inside the plastic container an aluminum package containing a block of dried plant materials suspected to be cannabis was found.

[4] Analysis by the government chemist ('SP4') confirmed that the block of dried plant materials recovered from the room were cannabis, 993.8g in weight.

[5] At the end of the prosecution's case the learned trial judge found a prima facie case was established against the appellant and called upon him to enter his defence.

THE DEFENCE CASE

[6] In his defence, the appellant gave evidence on oath and called four other witnesses. The appellant disputed the version given by the prosecution. He never handed over the cannabis to the police. The police ransacked the room and found the drugs in the cupboard and from underneath the table. He has no knowledge about the drugs and that others had access to his room namely his cousin Aboy and his uncle Kamil. The details of the appellant's defence has been fully set out by the learned trial judge at pp 34–35 of the appeal record.

[7] The other four defence witnesses gave evidence to the fact that the appellant's uncle, Kamil also stays in the house and that he was a confirmed drug addict. Aboy, the cousin has a free access to the room as he was very close with the appellant. SD2, an officer from the Pusat Serenti confirmed that Kamil was a drug addict and an inmate at the Pusat Serenti while SD3 and SD4 were the appellant's siblings and SD5 the appellant's other uncle. The evidence of SD3, SD4 and SD5 states that Kamil stays in the same house and Aboy who is very close to the appellant has a free access to the house and the room where the drugs were found. Kamil has passed away and Aboy has disappeared after the appellant's arrest.

THE TRIAL JUDGE'S DECISION

[8] At the end of the defence case, the trial judge held that in essence the defence is one of bare denial and an afterthought. The appellant was found guilty, convicted and was sentenced to death for the offence of trafficking in 993.8g of cannabis. Hence this appeal.

THE APPEAL

[9] Before us, learned counsel for the appellant raised two main grounds of appeal which are as follows:

(a) that the learned trial judge misdirected himself when he failed to appreciate the defence case; and

(b) that the learned trial judge misdirected himself when His Lordship acted

on the evidence of the first charge as similar fact evidence to prove knowledge in respect of the trafficking charge.

[10] In support of the first ground, learned counsel argued that the trial judge erred in holding the appellant's defence as an afterthought and a bare denial. Counsel submitted that the trial judge has erred in failing to appreciate that the appellant in his defence has challenged the prosecution's version of events that took place in the house. The appellant further complained of the trial judge's comment on the defence failure to call a certain witness and in invoking s 114(g) of the Evidence Act against him.

[11] The appellant's challenge on the prosecution's version of events that took place was taken during the cross-examination of SP5, SP7 and SP8. In his written submission, learned counsel has referred to us the specific challenges made to these witnesses as follows:

(a) Challenges by the appellant on SP5's evidence:

(i) At p 25 of the appeal record:

S: Bila masuk bilik itu awak terus arah anggota gelidah bilik itu.

J: Tak setuju.

(ii) At p 27 of the appeal record:

S: Saya katakan kepada awak barang salah yang dikata diserah oleh OKT sebenarnya barang salah yang dijumpai hasil penggelidahan dalam rumah khususnya dalam bilik tersebut.

J: Tak setuju.

(iii) At p 30 of the appeal record:

S: OKT tidak pernah pada mana-mana masa mengeluarkan apa-apa barang dan menyerahkan kepada Insp. Hafiz pada malam tersebut.

J: Tak setuju.

(iv) At p 32 of the appeal record:

S: Awak tidak bercakap benar tentang:

1. Bagaimana serbuan dijalankan

2. Bagaimana barang salah dijumpai dalam rumah.

J: Tidak setuju.

(b) Challenges to the evidence of SP7:

(i) At p 41 of the appeal record with regard to the search list (exh P22):

S: Awak tidak masukkan barang kes ini dijumpai oleh sesiapa sebab barang kes dijumpai oleh anggota awak.

J: Tidak setuju.

(ii) At p 43 of the appeal record:

S: Ketika sampai di rumah OKT awak dan anggota terus buat penggelidahan.

J: Tak setuju.

(iii) At p 44 of the appeal record:

S: Setelah awak dan anggota menggelidah barulah awak dan anggota menjumpai barang salah.

J: Tak setuju.

S: Keterangan awak tentang gari dan juga apa yang berlaku dalam bilik tidak benar.

J: Tak setuju.

(c) Challenge to the evidence of the investigating officer (SP8):

S: Barang-barang salah yang dijumpai adalah hasil serbuan dan penggelidahan anggota dalam rumah itu.

J: Tak setuju.

[12] From the above transcriptions it seems clear to us that the challenge put forth by the appellant was in respect of how the impugned drugs were recovered from the room. The appellant's version is that the police party ransacked his room and found the drugs themselves. It is also part of his defence that he did not bring the police party to his room, instead he was taken there.

[13] We are of the view that the appellant's cross-examination of SP5, SP7 and SP8 and putting to these witnesses his version is part of the process of his defence. What the appellant did was merely exercising his legitimate right and duty of advancing his defence during the prosecution's case itself. He crystallised the said defence as evidence during the defence stage when he together with SD2, SD3, SD4 and SD5 gave evidence. In our view, the defence put forth by the appellant is not a bare denial and certainly far from being an afterthought. We disagree with the learned trial judge.

[14] In *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236, it was held as follows:

> In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross-examination of those facts those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during the plaintiff's or prosecution's case.

[15] The appellant's defence was that he did not know about the drugs found in the room. The room is accessible to at least two or three other persons. The drugs could have been placed there by these other persons or could have belonged to his uncle Kamil, a confirmed drug addict. The accessibility of the room to these other persons was brought up when SP3 and SP8 were cross-examined (pp 9–10 and 55 of the appeal record). Clearly, the defence is not an afterthought.

[16] In his judgment, the learned trial judge found that certain facts were never put or suggested by the defence during the prosecution's case. They only surfaced during the defence. Hence His Lordship held them to be afterthoughts. These facts are adumbrated in paras a–i of His Lordship's judgment at pp 135–141 of the appeal record. We do not deem it necessary to reproduce those matters here but suffice to say that even if they are 'afterthoughts' as the learned trial judge has found them to be, they do not in any way help bolster the defence case and neither do they strengthen the prosecution's case.

[17] In further support of his contention that the trial judge has misdirected himself in failing to appreciate the defence case, learned counsel submits that the trial judge has failed to consider the evidence of SD2–SD5 which supports the appellant's version and defence that he was not in exclusive control of the room where the drugs were found and the drugs could have been placed there or belonged to others who had access to the room.

[18] We agree with learned counsel submission that the learned trial judge

did not consider and appraise the evidence of these defence witnesses. In para 25 of His Lordship's ground of judgment (pp 129–30 of the appeal record) a summary of the appellant's evidence was tabulated but nowhere else do we find His Lordship's consideration of the other defence witnesses' evidence. To use the learned counsel words, 'his Lordship brushed it aside without sufficient consideration'. To illustrate his point, learned counsel cited a passage from the judgment at pp 142–143 of the appeal record where His Lordship said:

> Pihak pembelaan cuba menunjukkan bahawa kawan-kawan OKT bebas masuk ke dalam bilik OKT yang tidak pernah berkunci itu bagi mewujudkan fakta bahawa mungkin dadah itu milik orang lain atau dadah itu disimpan di dalam bilik OKT tanpa pengetahuan OKT oleh orang lain. Pada pandangan mahkamah kemungkinan-kemungkinan yang cuba diwujudkan ini bukan suatu 'reasonable doubt' kerana kes pendakwaan adalah OKT yang menunjukkan tempat ia menyimpan dan mengambil sendiri dadah itu.

[19] We found the trial judge did not at all address his mind to the evidence of SD2, SD3, SD4 and SD5. This is a misdirection.

[20] We are in agreement with learned counsel submissions. The Federal Court in *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & anor* [2003] 2 MLJ 97 has set out what judicial appreciation of evidence means. It said:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[21] Again, in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, Chang Min Tat FJ at p 234 reiterated:

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[22] Finally, we would also echo the words of Gopal Sri Ram JCA (as he then

was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17 wherein His Lordship had stated:

> … a trier of facts, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in absence of a judicial appreciation of evidence is liable to judicial correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of evidence, assigning such weight to it as trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

[23] Our perusal of the records do not suggest that there has been any attempt on the part of the trial judge to critically examine the evidence of those defence witnesses called by the appellant to support his case. This merits our intervention and the learned trial judge's decision is liable to judicial correction.

SECTION 114(G) OF THE EVIDENCE ACT 1950

[24] The drawing of an adverse inference by the learned trial judge under s 114(g) of the Evidence Act 1950 on the failure of the defence to call L/Kpl Azhar is according to the learned counsel prejudicial to the appellant. We agree with the learned counsel that at p 139 of the appeal record the learned trial judge did comment on that failure of the defence. In his evidence, the appellant stated that Koperal Idurs (SP5) was the police personnel who escorted him and not L/Kpl Azhar. This was only brought up by the appellant when he gave evidence in his defence and was never raised during the prosecution's case when SP7 or SP5 was giving evidence. His Lordship held this was an afterthought and went further to say that the defence should have called L/Kpl Azhar who was later offered to the defence. Looking at the factual matrix of the case and having given our anxious consideration of that comment made by the learned trial judge, we do not think that the learned trial judge draw any adverse inference against the appellant's failure as alleged. But we are satisfied that His Lordship did comment on the failure which we think is really unnecessary and uncalled for. Perhaps, it would be timely for us to remind trial judges of the words of Raja Azlan Shah J (as His Majesty then was) in *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19 which goes:

> It is not the duty of an accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court otherwise it would amount to a misdirection.

SIMILAR FACT EVIDENCE

[25] At p 32 of the judgment (p 127 of the appeal record), the learned trial judge held that the fact that the appellant was arrested in respect of the 30.4g of cannabis found on him earlier, attracts the application of s 15 of the Evidence Act 1950. These facts according to the learned trial judge impute knowledge of the appellant. The relevant part of His Lordship's judgment is appended below:

> Fakta bilik tersebut berbau kanabis dan OKT ditangkap sebelum ini dengan kanabis seberat 30.4g membolehkan 'similar facts evidence' di bawah s 15 Akta Keterangan 1950 digunapakai. Kesemua fakta kes ini merangkumi kelakuan OKT dan pengetahuan OKT akan kedudukan sebenar semua kanabis seberat 993.8g tersebut bukanlah satu kebetulan sebaliknya OKT sememangnya mengetahui akan kewujudan kanabis di dalam biliknya sendiri.

[26] Learned counsel for the appellant took objection to this and submitted that the learned trial judge has misdirected himself in two aspects, namely:

(a) firstly, the first charge against the appellant is for possession of 30.4g of cannabis while the second charge is for trafficking and strictly speaking there is no similarity in respect of both the charges; and

(b) secondly, even if there is similarity, the trial judge before acting on the similar fact evidence must undertake a weighing exercise and ask whether the prejudicial effect of that similar fact evidence would be outweighed by its probative value.

[27] For ease of reference we append the relevant provisions of ss 14 and 15 of the Evidence Act 1950, minus the illustrations:

> 14 Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling is in issue or relevant.
>
> 15 When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act concerned, is relevant.

[28] The principle of law relating to similar fact evidence as laid down in *Makin v AG for New South Wales* [1894] AC 57 may summarily be stated as follows:

> (1) It is undoubtedly not competent for the prosecution to adduce evidence

A tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried; and

B (2) … the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

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[29] In support of his submission, learned counsel referred to us the case of *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 where at pp 226–227 Mohamed Azmi SCJ said:

D On the principle laid down in *Makin*'s case and *Boardman*'s case, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on the ground of relevancy and necessity to rebut and defence which would otherwise be open to the accused (in addition to thoses under ss 14 and 15 of the Evidence Act 1950), it is admissible in evidence provided the probative value of such evidence out weighs its prejudicial value. There must be a E real anticipated defence to be rebutted and not merely 'crediting the accused with a fancy defence' as emphasised by the Privy Council in *Noor Mohamed v R* at p 192.

[30] In *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; F [2004] 6 AMR 810, the accused was charged with raping a 15 year old girl. The prosecution in the course of the trial had adduced prejudicial similar fact evidence of previous acts of sexual intercourse. Gopal Sri Ram JCA (as he then was) speaking on the admissibility of similar fact evidence has the following to say at pp 821–822 of the report:

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A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss 14 and 15 of the Evidence Act 1950. The court would be justified in admitting the evidence where its probative value is outweighed by its prejudicial effect. See *Boardman v Director of Public Prosecutions* H [1975] AC 421, *Director of Public Prosecutions v Public Prosecutor* [1991] 2 AC 447; *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 2 AMR 2209; *Public Prosecutor v Teo Ai Nee* [1995] 2 SLR 69; *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422; *Lee Kwang Peng v Public Prosecutor* [1997] 3 SLR 278. In *Tan Meng Jee v Public Prosecutor*, Yong Pung How CJ when delivering the judgment of I the Singapore Court of Appeal said of the equipollent provisions in the Singapore Evidence Act:

Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in *Boardman*'s case.

Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused — based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence. With respect we entirely agree with the aforesaid dictum, coming as it does from so authoritative a source as His Honour the Chief Justice of Singapore. Further, like His Honour, we also find illustration (o) to s 14 of the Evidence Act 1950 to be relevant. That illustration reads:

A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

So, here too, PW2's evidence as to the appellant's previous acts of intercourse with her was relevant, that is to say, admissible. But that does not, on the authorities we have cited, relieve the court of determining whether the probative value of her evidence outweighed its prejudicial effect. We have carefully examined the record and nowhere in the judgment of the sessions court is there the kind of balancing exercise dictated by ss 14 and 15 of the Evidence Act. This is a serious misdirection. It occasioned a serious miscarriage of justice as the sessions court acted on the similar fact evidence to add three further charges against the appellant.

[31] We too have carefully examined the records of appeal before us and nowhere do we find in the judgment of the learned trial judge the kind of balancing exercise as dictated by ss 14 and 15 of the Evidence Act before admitting the similar fact evidence against the appellant. Again, this is a misdirection.

[32] Before leaving the issue, it is pertinent to address the point raised by learned counsel namely on the similarity of the two offences or charges against the appellant.

[33] On this issue of whether there is similarity between the offence of possession of 30.40g of cannabis for which the appellant was arrested earlier and charged and the present charge of trafficking in 993.8g of the same drug and whether similarity of the offences is a prerequisite, we can do no better than by referring to the case of *Public Prosecutor v Mohamad Roslan bin Desa & Anor* [2011] 4 MLJ 826 (Mahkamah Persekutuan Rayuan Jenayah No 05–28 Tahun 2007(K)).

[34] In the said case, the respondent was charged for the offence of murder under s 302 of the Penal Code on 28 December 1998. During the trial before the High Court, the prosecution attempted to introduce the record of proceedings in the sessions court where the respondent had pleaded guilty to an offence under s 304(b) of the same code which was committed on 11 December 1998. The High Court has rejected the evidence on the ground that there is no similarity between the two cases against the respondent. On appeal to the Federal Court by the public prosecutor, one of the grounds raised was similar fact evidence. The Federal Court, in a judgment delivered by Arifin bin Zakaria (HBM as he then was) stated the following as the proper test for the admission of similar fact evidence:

> The courts below rejected the similar fact evidence on the basis that there was no striking similarity between what happened in the earlier case and the present case. It should perhaps be noted that the House of Lords in *DPP v P* had retracted from the test laid down in *Boardman* as to the requirement of 'striking similarity' and said that it was inappropriate to single out "striking similarity' as an essential element in every case. But following *Boardman* it was held that the essential feature of admissibility of such evidence is whether its probative force in support of the charge is sufficiently great to make it just to admit the evidence notwithstanding that its prejudicial effect on the accused tending to show that he was guilty of another offence. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree. The test has since been authoritatively laid down in DPP v P in terms of probative value as against its prejudicial effect. There is force in saying that the decision in *DPP v P* is in line with ss 14 and 15 of the Evidence Act as 'striking similarity' has never been a requirement of the said sections.

[35] We also find it useful to recall the words of Scarman LJ in *R v Scarrott* [1978] QB 1016 on this issue of similarity of facts:

> Positive probative value is what the law requires, if similar fact evidence be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link, an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so common place that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.

[36] The authorities are clear that the similarity test is not a prerequisite for the admission of similar fact evidence.

[37] We sum up by saying that this is a case which is riddled with a number of unsatisfactory features. We are of the unanimous view that it is unsafe to uphold the conviction recorded against the appellant. The appeal is allowed

and we set aside the conviction and sentence on the trafficking charge. The appellant is hereby acquitted and discharged.

Appeal allowed, conviction and sentence on trafficking charge set aside.

Reported by Ashgar Ali Ali Mohamed